

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MICHAEL ASHBY,

Petitioner,

v.

JOSEPH LEHMAN,

Respondent.

Case No. C03-5385RJB

ORDER CLARIFYING  
REIMBURSEMENT OF THE  
FILING FEE, DIRECTING  
PRISON AUTHORITIES TO  
STOP COLLECTING FUNDS  
FOR PAYMENT OF THE  
APPELLATE FILING FEE,  
DIRECTING THE CLERK OF  
COURT TO REIMBURSE Mr.  
ASHBY FOR FUNDS RECEIVED  
FOR THE APPELLATE FILING  
FEE, DENYING PETITIONER'S  
MOTION FOR RECUSAL AND  
SENDING THE CASE TO THE  
CHIEF JUDGE

This Habeas Corpus petition filed pursuant to 28 U.S.C. § 2254 has been re-referred to this court following an appeal. When the case was re-referred the court entered a briefing schedule order. In that order the court asked the parties to address where the issue now before the court was raised and if the issue was exhausted (Dkt. # 52).

At that time, Petitioner had filed a motion asking for reimbursement of the appellate filing fee and for an order directing prison officials to stop taking money from his account for payment of the filing fee (Dkt. # 46). This motion was filed on August 1<sup>st</sup>, 2006. On August 21<sup>st</sup> the Ninth Circuit entered a mandate that taxed costs of \$163.40 (Dkt. # 49).

When petitioner's motion was ripe for review it appeared from the timing of the motion and

1 the cost bill that petitioner may have just received the relief he was requesting. The court entered an  
2 order directing respondent "to make whatever adjustment and/or payment is necessary to fully  
3 reimburse petitioner for whatever portion of the \$164.40 in costs he has actually expended" (Dkt. #  
4 53).

5 Petitioner has now filed a motion asking the undersigned to "disqualify" himself. The court  
6 considers the motion as a motion for voluntary recusal. Petitioner states this court is bias and has  
7 entered 2 rulings adverse to him since the case was remanded.

8 With regard to the briefing schedule order seeking specific briefing, petitioner states "The  
9 record in this case demonstrates that this issue was fully exhausted as respondent has admitted in its  
10 brief to the Ninth Circuit" (Dkt. # 55 page 2). The Ninth Circuit briefing is not part of the record  
11 before this court. See, Docket sheet. Thus, the court did not have the information before it and  
12 there was nothing improper in the court's order.

13 With regard to costs, Mr. Ashby now makes it clear that the costs he received from the Ninth  
14 Circuit of \$163.40 is for copying costs of briefs, not for the filing fee (Dkt. # 55, pages 3 and 4).  
15 Thus, the courts prior order did not properly address the issue and the court apologizes.  
16 Certain costs of appeal are taxable in District Court under the Federal Rules of Appellate Procedure.  
17 Under FRAP 39 (e)(4) the court may tax the cost of the filing fee. Petitioner cited to the rule and  
18 properly asked for reimbursement of the filing fee. The confusion arose only because of the timing  
19 of the Ninth Circuit mandate which also awarded costs.

20 Prison officials are hereby **ORDERED** to stop collecting any payment for this filing fee of  
21 \$105. Further, the clerk of court is **ORDERED** to send Mr. Ashby a check for the amount of the  
22 \$105 filing fee already collected.

23 The court now turns to the motion for recusal (Dkt. # 55). Petitioner asks that the  
24 Magistrate Judge recuse himself from this action. Pursuant to 28 U.S.C. 455 (a), a judge of the  
25 United States shall disqualify himself in any proceeding in which his impartiality might reasonably be  
26 questioned. The judge shall also disqualify himself in circumstances where the judge has a personal  
27 bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning  
28 the proceeding.

1 Under 28 U.S.C. § 144 and 28 U.S.C. § 455, recusal of a federal judge is appropriate if a  
2 reasonable person with knowledge of all the facts would conclude that the judge's impartiality might  
3 reasonably be questioned. Yagman v. Republic Insurance, 987 F.2d 622, 626 (9th Cir.1993). This is  
4 an objective inquiry concerned with whether there is the appearance of bias, not whether there is bias  
5 in fact. Preston v. United States, 923 F.2d 731, 734 (9th Cir.1992); United States v. Conforte, 624  
6 F.2d 869, 881 (9th Cir.1980). In Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147, 127  
7 L.Ed.2d 474, (1994), the Supreme Court further explained the narrow bases for recusal:

8 Judicial rulings alone almost never constitute a valid basis for a bias or partiality  
9 motion.... [O]pinions formed by the judge on the basis of facts introduced or events  
10 occurring in the course of the current proceedings, or of prior proceedings, do not  
11 constitute a basis for a bias or partiality motion unless they display a deep-seated  
12 favoritism or antagonism that would make fair judgment impossible. Thus, judicial  
13 remarks during the course of a trial that are critical or disapproving of, or even hostile  
14 to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality  
15 challenge. Id. at 555, 114 S.Ct. 1147.

16 This court makes rulings in each case based upon the issues presented by the parties or upon  
17 *sua sponte* review by the court. The court has no bias or prejudice in this case that would support a  
18 recusal or disqualification.

19 Having reviewed the rulings cited by plaintiff the court concludes the prior rulings do not  
20 show bias and the court should therefore decline to recuse voluntarily. Pursuant to Local Rule  
21 General Rule 8 this matter is referred to the Chief Judge.

22 Accordingly it is hereby **ORDERED** that the undersigned judge **DECLINES** to recuse  
23 voluntarily. The motion for recusal is **REFERRED** to Chief Judge Robert S. Lasnik for a decision.

24 The clerk is directed to send uncertified copies of this order to all counsel and to any party  
25 appearing *pro se* at said party's last known address. The clerk is further requested to place the  
26 request for the recusal on Judge Lasnik's motion calender. To prevent injury to any party this action  
27 is **STAYED** until Judge Lasnik rules on the motion to recuse.

28 DATED this 25<sup>th</sup> day of October, 2006.

/s/ J. Kelley Arnold  
J. Kelley Arnold  
United States Magistrate Judge